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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 498

JOHN WESLEY SHARPE,

Petitioner

v.

STATE OF MARYLAND,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above case on June 28, 1963.

CITATION OF OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 190 Atlantic Reporter, 2d Series 628 and is set forth in the appendix attached hereto, infra, 6a.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered June 28, 1963 (Clerk's certificate attached hereto, infra, App., 18a). The Court of Appeals of Maryland filed its opinions (majority, and two separate dissenting opin-

ions) on May 7, 1963. Thereafter petitioner filed his motion for re-argument on May 29, 1963 under the rules of the Court of Appeals of Maryland. The Court by its Order denied such motion and issued its mandate on June 28, 1963. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3), petitioner having asserted below and claiming here denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States

QUESTIONS PRESENTED

1. Is it a denial of due process under the Fourteenth Amendment to the United States Constitution for the Court of Appeals of Maryland to sustain the conviction of petitioner for assault upon an officer, where such conviction rested solely upon the lawfulness of petitioner's arrest, on the ground that his arrest was lawful inasmuch as petitioner had committed a traffic violation in the presence of the officer, a charge which was never made or tried, in view of the fact that petitioner had been arrested, tried, and convicted below on the charge of disorderly conduct?

2. Is it a denial of equal protection under the Fourteenth Amendment to the United States Constitution for the Court of Appeals of Maryland to sustain the conviction of petitioner on considerations which were not tried or decided below in view of the statutory and case law prohibitions against such a procedure by the Court of Appeals of Maryland?

3. Whether the decision below conflicts with the decision of this Court securing the Fourteenth Amendment right of petitioner to have his conviction appraised in the Court of Appeals on considerations of the case as it was tried and as the issues were determined in the lower court.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Article IV, Section 18A of the Constitution of Maryland,

> "* * * The Court of Appeals from time to time shall make rules and regulations to regulate and revise the practice and procedure in that Court and in the other Courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. * * *"

and Rule 885 of the Maryland Rules of Procedure.

> "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court."

STATEMENT

The Petitioner was arrested in Baltimore City on March 1, 1962 for disorderly conduct, infra, p. 2a. Following his arrest an altercation ensued and petitioner was charged with disorderly conduct and assault on officer. Under Maryland law petitioner would not be guilty of assault on officer if at the time of the assault he was under unlawful

arrest.) He was tried in the Criminal Court of Baltimore City, and convicted on both charges, and sentenced to a total of six months in the Baltimore City Jail.

Petitioner took an appeal to the Court of Appeals of Maryland where he raised the questions as to the lawfulness of his arrest for disorderly conduct and the validity of his conviction for assault on officer in view of the unlawfulness of his arrest.

The Court of Appeals of Maryland (five of seven judges) heard arguments in this case in due course and thereafter upon its own motion ordered a re-argument which was had before the full court. On May 7, 1963 the Maryland Court of Appeals filed a majority and two dissenting opinions. The majority opinion, after holding that "the case turns on the legality of the arrest", infra, p. 8a, held that the arrest was justified for failure to comply with the officer's demand to examine the operator's license under the circumstances.

On May 29, 1963 petitioner filed his motion for reargument, infra, p. 13a, with the Court of Appeals of Maryland in which he set forth that the opinion of the Court violated petitioner's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. On June 28, 1963 the Court of Appeals of Maryland denied the petitioner's motion without an opinion and made its judgment final by entering its mandate on the same day.

REASON FOR GRANTING THE WRIT

This case involves a substantial question affecting vital constitutional rights, resolved by the Court below in conflict with principles expressed by this Court.

I.

THE STATE OF MARYLAND HAS DENIED TO PETITIONER DUE PROCESS OF LAW BY SUSTAINING HIS CONVICTION FOR ASSAULT ON OFFICER, CONSIDERATIONS WHICH WERE NEITHER TRIED NOR DECIDED BY THE COURT BELOW.

Petitioner was tried in the Criminal Court of Baltimore City on the charge of disorderly conduct and assault on officer. He was found guilty on both charges. The testimony indicated, infra, p. 2a, that petitioner had been arrested for disorderly conduct. Petitioner was never charged or tried on a charge of violating the motor vehicle laws of the State of Maryland, nor was he arrested or detained for such a violation. The trial court found him guilty of disorderly conduct and inferentially determined that his arrest was lawful because he had committed the crime of disorderly in the presence of the officer.

The Court of Appeals of Maryland on appeal acknowledged that petitioner would not be guilty of assault on the officer if at the time of the arrest he was under unlawful arrest, but then proceeded to ignore the question of the lawfulness of his arrest for disorderly conduct as had been determined by the court below and decided that his arrest was lawful because he had committed a traffic violation. Of course the Court of Appeals of Maryland is thoroughly familiar with the long standing practice of police officers in Maryland of simply issuing summonses for minor traffic violations and not making arrests. The petitioner has never been called upon to refute the testimony of the officer respecting the traffic violation, nor was he ever called upon to suspect that such testimony could have any possible bearing upon his case.

This Court held in the case of *Cole v. State of Arkansas*, 68 Supreme Court 514, 333 U.S. 196 that

"To conform to due process of law petitioners were entitled to have the validity of their convictions appraised on considerations of the case as it was tried and as the issues were determined in the lower court."

This case appears to be exactly in point.

II.

THE STATE OF MARYLAND HAS DENIED PETITIONER EQUAL PROTECTION OF THE LAWS BY SUSTAINING HIS CONVICTION ON CONSIDERATIONS WHICH WERE NEITHER TRIED NOR DECIDED BY THE COURT BELOW IN VIEW OF THE STATUTORY AND CASE LAW PROHIBITIONS AGAINST SUCH PROCEDURE BY THE COURT OF APPEALS.

It is well recognized that the Court of Appeals of Maryland is the final authority on the question of what the Maryland law is. It is also recognized that the Court of Appeals of Maryland may reverse itself and announce the law to be contrary to its prior rulings, however the Court in petitioner's case does not pretend to announce any new law, it simply disregards the law as laid down by its rules and as announced by its decisions. *Martin v. State*, 203 Md. 66, 98 A. 2d 8; *German Union Fire Ins. Co. v. Fred G. Clarke Co.*, 116 Md. 622, 82 A. 974; *Gonzales v. Ghingher*, 218 Md. 123, 145 A. 2d 769; *Davis v. State*, 189 Md. 269, 55 A. 2d 702.

Prior to petitioner's case, and indeed even now, defendants coming before the Court of Appeals of Maryland have the right to have their cases determined on considerations which were tried and decided below. The Court of Appeals of Maryland has denied petitioner this right, and has therefore deprived him of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

III.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT SECURING THE FOURTEENTH AMENDMENT RIGHT OF PETITIONER TO HAVE HIS CONVICTION APPRAISED ON CONSIDERATIONS OF THE CASE AS IT WAS TRIED AND AS THE ISSUES WERE DETERMINED IN THE LOWER COURT.

The issues in the present case are not unlike those presented to this Court in the case of *Cole v. State of Arkansas*, 68 Supreme Court 514, 333 U.S. 196.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix To Appellant's Brief, No. 206.

Judgments Appealed From

(No. 171)

May 22, 1962 — Six (6) Months in Baltimore City Jail from today.

(No. 172)

May 22, 1962 — Thirty (30) Days in Baltimore City Jail. Concurrent with Appeal Number 171 1962.

Testimony

(T. 1) (The Clerk) John W. Sharpe, in appeal 171, the State of Maryland charges assault on officer. Appeal 172 charges disorderly conduct.

(Mr. Freedman) Not guilty, court trial.

Officer James McGuire

Direct Examination

By Mr. Lusby:

Q. Do you know John Wesley Sharpe? A. Yes sir.

Q. See him here? A. Yes.

Q. Point to him please? A. (Indicating the defendant.)

Q. Did you see him March 1st of this year? A. Yes sir.

(T. 2) Q. When and where and under what circumstances? A. 5:15 P.M., March 1st, we were in the 3800 block Clifton Avenue, alongside 3802. It's an alley. Mr. Sharpe backed his car out of the alley without coming to

a stop causing me to come to a sudden stop. I beckoned him to the curb. I got out and approached Mr. Sharpe and asked for his registration and driver's license. At this time he got his wallet out containing his driver's license. I asked him to take his license out of his wallet. He says, "I ain't going to take it out". I didn't answer. He said, "You can see it enough where it is". I advised him it's department policy not to handle personal property. He says, "I ain't taking it out". He got profane.

Q. What did he say? A. He said, "I ain't taking this g.d. license out of this wallet".

Q. Where was he at this time? A. Sitting in his car along with a woman.

Q. Go ahead. A. I advised him he was under arrest for (T. 3) disorderly conduct. I advised him to get out. At this time a woman passenger got out of the passenger side. Mr. Sharpe said, "If you want me out of this m.f. car, you are going to have to take me out". He got out and started walking towards the woman. I told him he was under arrest. He ripped my shirt and tore my tie off.

Q. Struck you with what? A. His fist.

Q. How many times? A. I don't know. He struck me once grabbed me, then we exchanged blows.

Q. Is that the torn shirt? A. Yes.

(Mr. Lusby). The State will offer the shirt as State's Exhibit number one.

(The above referred to shirt was admitted into evidence and marked as State's Exhibit number one.)

(The Witness) Scuffled in the middle of Clifton Avenue. Scuffled across the street to the alley and Officer Block helped me restrain him until the cruising patrol came.

Q (Mr. Lusby) Did you require any medical (T. 4) treatment? A. I was treated at Mercy Hospital for laceration of the neck and right arm.

Q. What did they do for you there? A. Just medication. I was returned to duty. I was taken to the crime lab where a photograph was taken to the extent of my injuries.

(Mr. Freedman) No questions.

(The testimony of the witness was concluded)

(Mr. Lusby) The State will rest.

* * * * * *

(T. 26) (Mr. Freedman) That's our case too. I ask for a verdict of not guilty.

(The Court) If I had any doubt about it, I would give it to him and if I felt your witnesses saw the whole incident I would have to say there would be some doubt about it. I don't believe she saw it all. I think the first thing she saw was the officer's blows. The testimony was there had been a previous blow struck by the defendant. His explanation is the officer is out looking for a case. They had a case right in the automobile they were investigating. They weren't necessarily looking for a case. I don't think that is so. When he was asked for his registration card, he gives a perfectly valid excuse for being upset about it if what he says happened, actually did what the officer said, what he says he called him, but (T. 27) that still would be no reason for the assault. I think he is mistaken about it. There isn't any doubt about his car blocking the traffic. He says so himself. He said it was cold and it stopped but it was certainly blocking traffic. The officer had every right to go over and inquire.

My verdict isn't based on his prior record. It goes to his credibility and it was the only kind of trouble he has been in; this sort of thing. The verdict is guilty in both appeals.

Mr. Freedman, this is a type of thing we have had entirely too much of, not only in Baltimore but elsewhere. These men are out on the street to protect the citizens. They are taking their lives in their hands every time they go out and you know it as well as I do and there is no

reason for them to be subjected to incidents of this character. I take it you are ready for sentence.

(Mr. Freedman) I trust the sentence won't be any different than it was in Magistrate's Court.

(The Court) It was tried de novo. I'm going to (T. 28) call it the way I see it. The sentence in Appeal 171 is six months in the Baltimore City Jail. The sentence in Appeal 172 is thirty days in the Baltimore City Jail. I'll make them run concurrent.

APPENDIX TO APPELLEE'S BRIEF NO. 206

TESTIMONY

(T. 1) OFFICER JAMES McGUIRE

DIRECT EXAMINATION

By Mr. Lusby:

* * * * * *

(T. 2) A. * * * Mr. Sharpe backed his car out of the alley without coming to a stop causing me to come to a sudden stop. * * * He says, "I ain't taking it out". He got profane.

Q. What did he say? A. He said, "I ain't taking this g.d. license out of this wallet".

Q. Where was he at this time? A. Sitting in his car along with a woman.

* * * * * *

(T. 4) MRS. LOUISE EVANS

DIRECT EXAMINATION

By Mr. Freedman:

* * * * * *

(T. 5) A. I was in the cab coming down the 3800 block Clifton Avenue and the traffic had stopped. * * *

* * * * * *

(T. 6) CROSS EXAMINATION

By Mr. Lusby:

* * * * * *

(T. 7) A. Yes. What he said I don't know. This officer's mouth was just running.

Q. Sharpe's mouth was running too? A. He was talking back to him.

* * * * * *

(T. 8) Q. Where were you? A. I was in the cab. Traffic was stopped.

Q. Where was the cab? A. 3800 block Clifton Avenue on the right hand side.

Q. In relation to where Mr. Sharpe's car was? A. In relation to where it was?

Q. Yes. A. It was right in back of his car.

Q. You were right behind them? A. Yes.

* * * * * *

(T. 10) (The Court) Was the cab stopped for a light?

(The Witness) No.

(The Court) Why was the cab stopped?

(The Witness) Everybody was stopped moving.

* * * * * *

(T. 14) JOHN WESLEY SHARPE

DIRECT EXAMINATION

By Mr. Freedman:

* * * * * *

(T. 16) A. When he hit me, I hit him back and held on (T. 17) to keep him from beating me up.

* * * * * *

(T. 21) OFFICER MELVIN BLOCK

DIRECT EXAMINATION

By Mr. Lusby:

* * * * * *

(T. 22) (The Witness) * * *. (T. 23) Just a routine check. I heard the talking. The talking became louder

and there was profanity used on the part of Mr. Sharpe. I have in my report two words that I heard. * * * Finally Mr. Sharpe did get out of the car and he was under arrest at the time when he started walking towards the woman. Officer McGuire grabbed him at the back of his coat. At this point he was out of the car standing by the door. At this point when Officer McGuire grabbed Mr. Sharpe from behind he swung around and struck Officer McGuire full in the face. * * *

(T. 24) CROSS EXAMINATION

By Mr. Freedman:

* * * * * *

(T. 25) Q. (Mr. Freedman) Did you see the other boy there, Pearce Gaines? A. No, there was a crowd of people around by the time we got to the other side of the street.

Q. And your testimony is Officer McGuire was struck first by this man? A. Correct.

* * * * * *

Opinion by Henderson, J.

Brune, C. J., Hammond & Marbury, J. J.

Dissent

The appellant was tried and convicted in the Municipal Court of Baltimore City on charges of disorderly conduct and of assaulting a police officer. He was sentenced to thirty days in jail on the first charge and sixty days on the second, to run concurrently. On appeal to the Criminal Court of Baltimore he was tried by the court without a jury and again found guilty on both charges, sentenced to thirty days on the first charge and six months on the second, to run concurrently. The appeal to this Court is based on Code (1962 Supp.), Art. 5, sec. 12A (2), "Where the sentence of the Municipal Court of Baltimore City was imprisonment only and the sentence of the Criminal Court

of Baltimore on appeal therefrom is imprisonment for a greater term * * *." Technically, it appears that only the judgment in the assault case is before us. Sec. 12A provides that only where a case is brought within the exceptions listed is there a further appeal to this Court.

There were two versions of what occurred, but since both the triers of fact chose to believe the testimony of the police officers, and we cannot find that the trial judge was clearly wrong if there was credible evidence to support his findings, we shall simply state the substance of the testimony of the officers. According to them, on March 1, 1962, about 5 P. M., while they were on cruising patrol in a police car, the appellant backed his car out of an alley without stopping, causing them to make an abrupt stop to avoid collision. See Code (1957), Art. 66½, sec. 243. Cf. Sec. 234. Officer McGuire ordered the appellant to pull over to the curb, approached the car on foot and asked the appellant for his operator's license and registration card. Sharpe got out his wallet containing his driver's license, but refused to take the license out. He told the officer: "you can see it enough where it is." He also said: "I ain't taking this g—— d—— license out of this wallet." The officer then told Sharpe he was under arrest for disorderly conduct, and asked him to get out of the car. Sharpe replied: "If you want me out of this m—— f—— car, you are going to have to take me out." Obviously, he did not submit to arrest. A woman passenger in the car got out the other side. Sharpe then got out and started to walk away. On the facts in this case, the arrest did not occur until McGuire grabbed his coat. Cf. *Childress v. State*, 227 Md. 41, 43. A scuffle ensued in which Sharpe struck the officer with his fists, and tore his shirt. The other officer Block, who had remained in the patrol car, then came to McGuire's assistance and they took Sharpe to the station house. Block testified he heard profanity used by Sharpe and saw him strike the first blow. He also testified that a crowd had gathered at the time of the scuffle. Another witness, Mrs. Evans, who was sitting in a cab that had stopped along with other traffic, heard Sharpe "talking back" to the officers.

The case turns on the legality of the arrest. If the arrest was lawful, the appellant was not justified in resisting it, and assaulting the police officer. See *Kellum v. State*, 223 Md. 80, 85 and *Price v. State*, 227 Md. 28, 41. We think the arrest was lawful. Officer McGuire was clearly within his rights in asking to see Sharpe's operator's license, after he had witnessed a traffic violation. *Bradley v. State*, 202 Md. 393, 397. Cf. *Cornish v. State*, 215 Md. 64, 67. Code (1957), Art. 66½, sec. 97 expressly provides that "Operating licenses shall at all times be carried by the licensee when operating a motor vehicle * * *, and shall be subject to examination upon demand by an uniformed officer of the law * * *." Sec. 338 makes it a misdemeanor to violate "any of the provisions of this article unless * * * declared to be a felony." See Sec. 31, for similar provisions as to registration cards. Under a similar statute in Indiana, it was held that an arrest for failing to exhibit a driver's license was lawful, *Rucker v. State*, 77 N.E. 2d 355, 357.

The request that the card be removed from the wallet was not unreasonable. Some licenses have restrictions, or other data, on the back, and the officer testified that it was departmental policy not to "handle personal property," such as a wallet. Refusal to obey a proper order of an officer may constitute an offense justifying an arrest, particularly where there is profanity in the presence of others that may threaten a breach of the peace. Cf. *Drews v. State*, 224 Md. 186, 192 and cases there cited. See also *Lippert v. State*, 139 N.Y.S. 2d 751; *City of St. Petersburg v. Calbeck*, 121 So. 2d 814 (Fla.); *City of Saint Paul v. Morris*, 104 N.W. 2d 902 (Minn.). Other cases are collected in a note, 34 A.L.R. 566. In the present posture of the case, however, we do not reach the question whether the charge of disorderly conduct could be justified. We hold that the arrest was justified for failure to comply with the officer's demand to examine the operator's license under the circumstances. The fact that he was not charged with that offense would seem to be immaterial. Cf. *Price v. State*, *supra*, where charges of assault upon an officer were sustained, because the officer had reasonable grounds to be-

lieve that the accused was attempting burglary at the time of the arrest, although never charged with that offense.

Judgment Affirmed, With Costs.

Dissenting Opinion by Marbury, J.
in which Brune, C. J. and
Hammond, J. concur

Marbury, J., dissenting:

I think both judgments should be reversed without a new trial. Maryland Rule 886 a.

I agree that the version of the facts as set forth in the majority opinion is substantially a true narration of the events leading to appellant's arrest, trial and conviction for disorderly conduct and assault upon an officer. I further agree that the case turns upon the legality of the arrest for disorderly conduct, but it seems to me that the majority opinion misses the salient point in the case. Appellant was not arrested and tried under Code (1957), Article 66½, §§97 and 338. He was arrested for disorderly conduct under Article 27, §123, and the gist of the crime of disorderly conduct has been stated by this Court to be "* * * the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area." *Drews v. State*, 224 Md. 186, 192, 167 A. 2d 341.

A careful examination of the testimony convinces me that the evidence was insufficient to support a finding that the appellant was guilty of disorderly conduct. Rule 886 a, *supra*. No doubt, a scuffle arose between the appellant and the arresting officer. The question is whether, prior to the scuffle, words or actions of appellant were sufficient to justify his being placed under arrest for disorderly conduct. Accepting the officer's testimony as true, there was no evidence that appellant's alleged vile language was such as to offend, disturb, incite, or tend to incite a number of people gathered in the same area. There was no evidence that anyone, except Officer McGuire, and possibly

Officer Block, heard what appellant said in the presence of Officer McGuire. Cf. *Heinze v. Murphy*, 180 Md. 423, 428, 24 A. 2d 917. I point out that the profanity used by the appellant did not involve a characterization of the officer or calling him a vile name.

The majority opinion seems to read into Section 123 of Article 27 something that is simply not there. If this section should be amended to include using profane language in the presence of an officer, or failing to comply with a proper demand of a traffic officer (Code (1957), Article 66½, §97), this is a matter for consideration by the Legislature and does not justify judicial legislation to amend the statute with reference to disorderly conduct.

The cases from other jurisdictions cited in the majority opinion are all distinguishable, either on their facts or due to a specific statute in each of those jurisdictions not comparable to the Maryland statute dealing with disorderly conduct. In all of those cases, the profanity or vile remarks consisted of derogatory characterizations of the police officers involved. As stated above, this element was not present in the instant case. In *City of St. Paul v. Morris*, 104 N. W. 2d 902, 911, there was a vigorous dissent by Justice Loevinger of the Supreme Court of Minnesota, in which he stated, *inter alia*:

> "The very violence of feeling aroused by an offensive expression should warn judges of the dangers of being injudicious and of the impropriety of determining legal significance by their own reactions or feelings. The mere fact that acts or words are offensive does not mean that they are 'disorderly' or within that special category of disorderly described as noise, riot, disturbance, or diversion."

I do not see how there could have been disorderly conduct prior to the arrest in this case, particularly in the absence of testimony of any persons other than the officers being affected by the language.

Since, as I see it, the arrest was illegal, appellant was justified in using any reasonable means, even force, to

effect his escape. *Williams v. State*, 204 Md. 55, 64, 102 A. 2d 714; *Sugarman v. State*, 173 Md. 52, 57, 195 Atl. 324. I am of the opinion that appellant was not guilty of assault under the circumstances in using reasonable means to resist an unlawful arrest.

In spite of the provisions of Code (1962 Cum. Supp.), Article 5, §12A, cited by the majority, that technically only the assault case is before us. I consider that the disorderly conduct charge and the assault charge are so intertwined that a consideration of the latter, without a consideration of the former, would be untenable and a denial of justice to the appellant. The disorderly conduct charge could have been brought before this Court by appropriate action under Code (1957), Art. 5, Sec. 21, and this case was treated by both sides as properly before us and we called for a reargument on the question of what constituted disorderly conduct. We think that this Court should have done what it did in *Moulden v. State*, 217 Md. 351, 142 A. 2d 595, and should have treated the appeal as a petition for a writ of certiorari and should have granted the application and determined this case on the merits.

Chief Judge Brune and Judge Hammond authorize me to say that they concur with the views here expressed.

Concurring Dissent by
Hammond, J., in which
Brune, C. J. concurs

Hammond, J., dissenting:

I concur in the dissent prepared by Judge Marbury but I deem it appropriate to add further observations.

The majority decides this case on a point (that the arrest was lawful because Sharpe had violated Code (1957), Art. 66½, Sec. 97 — failure to exhibit license) that was not raised, considered or decided below, was not mentioned in either brief and was not referred to — or apparently even thought of — by the arresting officer, and then, it is clear to me, decides it wrongly.

The majority opinion suggests that refusal to obey a proper order of an officer "may" constitute an offense "particularly where there is profanity in the presence of others that may threaten a breach of the peace," (which is so when a statute makes it so, but Maryland has no such statute) and then expressly — and understandably — avoids deciding that Sharpe was guilty of disorderly conduct. There was no evidence that profanity likely to threaten a breach of the peace was used in the presence of others.

Nor was there, taking the arresting officer's version of the affair, evidence sufficient to convict one of violation of Art. 66½, Sec. 97. When Sharpe was asked for his license, he took his wallet from his pocket and exhibited the license to the officer. It is not clear from the meagre record, but it well may be that the license was in a plastic "page" of the wallet, so that both front and back could be seen without its removal. The arresting officer's testimony could so indicate. He said that Sharpe said "You can see it enough where it is," and that he, the officer, "didn't answer." The officer has never said he could not sufficiently see the license while it was in the wallet. The majority says that the officer's request that the license be removed from the wallet was "not unreasonable." If this be assumed, as well as that Sharpe's refusal to remove it was unreasonable, mere unreasonableness is not a crime. What is more to the point, the officer did not think that Sharpe had violated the inspection of licenses statute because it was only when Sharpe used the words "God damned" (in reference to the license) that the officer arrested him. He then immediately told Sharpe he was under arrest for disorderly conduct.

The arrest was illegal because Sharpe had not been guilty either of disorderly conduct, with which he was then charged, or of violation of Sec. 97 of Art. 66½, of which the majority of this Court, in effect, trying the case de novo for the second time, now find him guilty.

Since Sharpe was told he was under arrest for disorderly conduct, of which he was not guilty, his right to resist

arrest was established; and the means availed of under the circumstances, including the subsequent profanity, were not beyond the permissible range, if the black letter right to resist illegal arrest is to be more than a paper or theoretical right and is to be recognized in practice.

The police have a difficult time in performing their onerous duties, and citizens should cooperate with them. Nevertheless, a police officer has no right to throw his weight around and require subservience to his authority just because he has it or to take out his irritation on the other driver because a car backs out of an alley in front of him (he was not charged with a traffic violation). Sharpe was foolish and boorish; and his reaction to being pushed around, as he saw it, should have been restrained, as should his use of profanity which was ill-advised, unattractive and an empty substitute for thought, as it usually is. In this case, it brought him only a severe beating by the two officers, arrest and conviction.

The officer's impolitic conduct should not have produced Sharpe's discourtesy or arrogance in return; but while discourtesy or arrogance to a policeman may infuriate him, and so are unwise to indulge in, they are not crimes which the policeman may translate into disorderly conduct in order to vent his annoyance by making an arrest.

I would reverse. Judge Brune has authorized me to say that he concurs in the views herein expressed.

MOTION FOR RE-ARGUMENT

Appellant, John Wesley Sharpe, by Archie D. Williams, his Attorney, moves this Honorable Court for a Re-Argument of his case, and states the following as his reasons:

1. The decision of this Court denies to the Appellant due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. This Court has found the arrest of Appellant to be justified because of his failure to comply with the officer's demand to examine the operator's license under the circumstances. This issue was

never tried in the lower court, nor is there any indication that such issue was ever even considered in any way by the lower court, nor is there any indication that a consideration of such issue was remotely necessary to the decision reached in the lower court. This decision is in direct conflict with the decision of the United States Supreme Court in the case of Cole v. State of Arkansas, 68 Supreme Court 514, 333 U.S. 196 where the Supreme Court said:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on considerations of the case as it was tried and as the issues were determined in the lower court."

Here the Appellant has never had an opportunity to defend himself against the charge which this Court now finds him lawfully arrested for. What the majority of the Court seem to be saying is that if Appellant had been arrested for violating Article 66½ of the Maryland Code, such arrest would have been lawful. The basic concept of due process of law, even without the aid of a Supreme Court decision, would seem to require that the lawfulness of his arrest would be determined by consideration of the arrest that was made, not one that might have been, but was not made.

2. The decision of this Court denies to the Appellant the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. Rule 885 of the Maryland Rules of Procedure with reference to the Court of Appeals states:

> "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; * * *" (exceptions stated).

The Maryland Rules of Procedure have the force of law by virtue of Article IV, Section 18A of the Maryland Constitution. The record in this case is completely devoid of any suggestion that the Court below either "tried" or "decided" the question as to the lawfulness of the arrest of Appellant for violating Article 66½, nor is there any indi-

cation that such question comes within the exceptions of Rule 885. This law establishes the procedure for handling all other litigants before this Court, and to deny Appellant the benefit of this law is clearly to deny to him the equal protection of the laws in violation of the Federal Constitution.

WHEREFORE, Appellant respectfully moves this Honorable Court to grant a Re-Argument in his case.

Respectfully submitted,

ARCHIE D. WILLIAMS,
Attorney for Appellant.

THIS IS TO CERTIFY that I have this 28th day of May, 1963 mailed a copy of the aforegoing Motion for Re-Argument to Thomas B. Finan, Esquire, Attorney General for the State of Maryland.

ARCHIE D. WILLIAMS.

COURT OF APPEALS OF MARYLAND
Annapolis, Md.

June 28, 1963

Archie D. Williams, Esq.
Attorney at Law
2669 Pennsylvania Avenue
Baltimore 17, Maryland

Dear Sir:

The Court has considered your motion for reargument, filed on May 29, 1963, in the case of *John Wesley Sharpe v. State of Maryland*, No. 206, September Term, 1962, and, for your information, said motion was denied this date.

The mandate and the transcript have been forwarded to the Criminal Court of Baltimore.

A copy of the mandate is herewith enclosed.

Very truly yours,

J. LLOYD YOUNG,
Clerk.

MANDATE

Court of Appeals of Maryland

No. 206, September Term, 1962

John Wesley Sharpe

v.

State of Maryland

Appeal from the Criminal Court of Baltimore.

Filed: September 11, 1962.

May 7, 1963: Judgment affirmed with costs. Op. by Henderson, J. Dissenting opinion by Marbury, J. in which Brune, C. J. and Hammond, J. concur. Concurring Dissent by Hammond, J. in which Brune, C. J. concurs.

May 29, 1963: Motion for reargument filed.

June 28, 1963: Motion denied.

STATEMENT OF COSTS:

In Circuit Court:

Record	—
Stenographer's Costs	$28.00

In Court of Appeals:

Filing Record on Appeal	$20.00
Printing Brief for Appellant	56.08
Reply Brief	
Portion of Record Extract — Appellant	
2 Appearance Fees — Appellant	20.00
Motion for Reargument	5.00
Printing Brief for Appellee	62.45
Portion of Record Extract — Appellee	
Appearance Fee — Appellee	10.00

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this twenty-eighth day of June A. D. 1963.

J. Lloyd Young,
Clerk of the Court of Appeals
of Maryland.

(Seal)

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

STATE OF MARYLAND, SCT.

I, J. LLOYD YOUNG, Clerk of the Court of Appeals of Maryland, the highest Court of said State with final jurisdiction on appeals from the trial courts therein, do hereby certify that the foregoing are full and true copies of the documents, originals of which are on file in the office of said Clerk, in the appeal of John Wesley Sharpe v. State of Maryland, No. 206 — September Term, 1962:

1. Appellant's Appendix, filed in this office on October 22, 1962.
2. Appellee's Appendix, filed in this office on November 13, 1962.
3. Majority Opinion of the Court of Appeals, filed on May 7, 1963.
4. Dissenting Opinion filed on May 7, 1963.
5. Concurring Dissent filed on May 7, 1963.
6. Motion for Reargument filed on May 29, 1963.
7. Letter denying Motion for Reargument dated June 28, 1963.
8. Mandate of Court of Appeals, dated June 28, 1963.

IN TESTIMONY WHEREOF, I have hereunto set my hand as Clerk and affixed the Seal of the Court of Appeals of Maryland this eighteenth day of September, 1963.

J. LLOYD YOUNG, Clerk,
Court of Appeals of Maryland.

(Seal)